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Scope Inquiry
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MEMORANDUM FOR:

Richard Moreland
Deputy Assistant Secretary
AD/CVD. Enforcement Group I, Office 2

FROM:

Louis Apple
Director, Office 5
AD/CVD Enforcement Group II

SUBJECT:

Final Scope Ruling--Antidumping Duty Order on Pure
Magnesium from the People's Republic of China
Requested by Rossborough Manufacturing Company L.P.

Summary

On April 2, 1999, we preliminarily determined that magnesium alloy ingots imported by Rossborough Manufacturing Company L.P. ("Rossborough") are within the scope of the antidumping duty order on pure magnesium from the People's Republic of China (PRC) because they are "off-specification pure" magnesium explicitly covered by the order (60 FR 25691; May 12, 1995). We gave interested parties an opportunity to comment.

After a thorough analysis of the comments and rebuttal comments received from the parties, as well as a review of the record, and evidence from the less-than-fair value (LTFV) investigation which gave rise to this order, we recommend that the Department finally determine that the subject magnesium alloy ingots imported by Rossborough are within the scope of the antidumping duty order.

Background

The products covered by the scope of the antidumping duty order on pure magnesium from the PRC are as follows:

Pure primary magnesium regardless of chemistry, form or size unless expressly excluded from the scope of this order, pure primary magnesium encompasses products (including, but not limited to, butt ends, stubs, crowns and crystals) with the following primary magnesium contents:

- (1) Products that contain at least 99.95% primary magnesium, by weight (generally referred to as "ultra-pure" magnesium);



- (2) Products that contain less than 99.95% but not less than 99.8% primary magnesium, by weight (generally referred to as "pure" magnesium); and
- (3) Products (generally referred to as "off-specification pure" magnesium) that contain 50% or greater, but less than 99.8% primary magnesium, by weight, and that do not conform to ASTM specifications for alloy magnesium.

"Off-specification pure" magnesium is primary magnesium containing magnesium scrap, secondary magnesium, oxidized magnesium or impurities (whether or not intentionally added) that cause the primary magnesium content to fall below 99.8 percent by weight. It generally does not contain, individually or in combination, 1.5 percent or more, by weight, of the following alloying elements: aluminum, manganese, zinc, silicon, thorium, zirconium and rare earths. (See "Clarification of Antidumping Order Pure Magnesium from the People's Republic of China" (May 22, 1997)).

Among the products excluded from the scope of the order is alloy primary magnesium (that meets ASTM specifications for alloy magnesium). See Notice of Antidumping Duty Orders: Pure Magnesium from the People's Republic of China, the Russian Federation and Ukraine; Notice of Amended Final Determination of Sales at Less Than Fair Value: Antidumping Duty Investigation of Pure Magnesium from the Russian Federation, 60 FR 25691 (May 12, 1995); and "Final Scope Ruling--Antidumping Duty Order on Pure Magnesium from the People's Republic of China (PRC)" (November 14, 1997).¹

¹The petition was filed on March 31, 1994. For purposes of initiation of the LTFV investigation, we considered the products covered by the petition to be two classes or kinds of merchandise, *i.e.*, pure magnesium and alloy magnesium. The Department initially included certain "off specification" pure magnesium in its alloy magnesium class or kind of merchandise. See Initiation of Antidumping Duty Investigations: Pure and Alloy Magnesium From the People's Republic of China, the Russian Federation, and Ukraine, 59 FR 21748 (April 26, 1994). However, in its final determination, the Department clarified its scope definition to include "off specification" pure magnesium in its pure magnesium class or kind of merchandise, instead of its alloy class or kind of merchandise. See Final Determination of Sales at less Than Fair Value: Pure Magnesium and Alloy Magnesium from the People's Republic of China, 60 FR 16437 (March 30, 1995) (Pure Magnesium Final Determination). The Department explained that "although ASTM standards define pure magnesium as not less than 99.8 percent magnesium, metal with a primary magnesium content below that level should be captured in the scope of the pure magnesium investigations if it cannot legitimately be defined as a specific ASTM alloy magnesium." See *id.* (Department's position to Comment 1).

The International Trade Commission ("Commission") found in its final injury decision that there were two separate like products--magnesium and alloy magnesium--each corresponding to the respective class or kind found by the Department (see Determination of the Commission (Final), USITC Publication 2885, May 1995 at page 7). In its final determination, the Commission determined that an industry in the United States was materially injured or threatened with material

On December 21, 1998, Rossborough requested that the Department issue a scope ruling stating that magnesium alloy ingots imported by Rossborough from the PRC are outside the scope of the antidumping duty order on pure magnesium from the PRC. In its scope application, Rossborough described the magnesium it imported as magnesium alloy ingots conforming to ASTM specification AZ10A. Rossborough claimed that these ingots are excluded from the categories of "ultra-pure" and "pure" magnesium as defined in the antidumping duty order, because their magnesium content is not greater than 98.11%. Rossborough also argued that its ingots do not meet the order's definition of "off-specification pure" magnesium because they contain specified alloys which exceed 1.5 percent and conform to ASTM alloy magnesium specification AZ10A.

On the basis of the above request and our review of the case record, we concluded that further information was needed in order to make a scope determination. Therefore, we initiated a formal scope inquiry, pursuant to 19 CFR 351.225(e), on January 14, 1999. We requested comments and/or factual information from all interested parties addressing this scope issue. On February 2 and 3, 1999, the Department received comments from Rossborough and Magnesium Corporation of America ("Magcorp"), the petitioner in the proceeding, respectively. On February 16, 1999, the Department received rebuttal comments from both Rossborough and Magcorp.

Rossborough interprets the scope of the order to require that merchandise classified as "off-specification pure" magnesium contains less than 99.8% primary magnesium and less than 1.5%, by weight, of certain alloying elements. Rossborough argued that because the magnesium ingots it imports contains more than 1.5% of certain alloying elements, they do not conform to the order's definition of "off-specification pure," and are consequently not included within the scope of the order. Moreover, Rossborough argued that if the magnesium alloy ingots it imports from the PRC were to meet all other criteria for "off-specification pure" magnesium, they would still be excluded from the scope of the order because they meet the criteria for AZ10A alloy magnesium as recognized by ASTM. To reinforce this argument, Rossborough stated that AZ10A magnesium meets a recognized 1995 ASTM definition for alloy magnesium, such definition being based on alloy content, not just working specifications.

Although Rossborough admitted that AZ10A was "not a[n ASTM] specification in the 'working standard' sense," Rossborough stated that "AZ10A was a registered standard designation of ASTM." Rossborough noted that AZ10A magnesium was removed from the ASTM register in 1996 due to a low incidence of use, not because the alloy content criteria had changed. Rossborough argued, however, that in 1995, at the time the Department issued its antidumping duty order on pure magnesium from the PRC, "the ASTM magnesium alloy standards included AZ10A on its registration table."

injury by reason of imports of pure magnesium from the PRC, but not by alloy magnesium from the PRC. Consequently, the Department issued its antidumping duty order covering only pure magnesium from the PRC.

Rosborough noted that the Department excluded magnesium conforming to ASTM "specifications" for alloy magnesium from the off-specification pure magnesium category of merchandise subject to the order. Rosborough argued, however, that nothing in the original scope of the order or the Department's response to comments in the final determination of the LTFV investigation indicates that the Department intended to use ASTM "specifications" as a restrictive term of art. As Rosborough's magnesium ingots meet a recognized 1995 ASTM definition of alloy magnesium, Rosborough claimed that they fall within the Department's exclusion and therefore are outside the scope of the order.

Alternatively, Rosborough stated that, should the Department decide to apply a restrictive reading of the scope description in the order, that interpretation should be prospective only and not made retroactive in a way that would prejudice an importer exercising reasonable care and conducting business in good faith.

Magcorp argued that the scope of the order was designed to include material such as Rosborough's AZ10A magnesium ingots. Magcorp maintained that in order to avoid circumvention of the order, the Department revised the scope language contained in its final determination "to make the ASTM standards for magnesium alloy the ultimate test of whether a material is truly a magnesium alloy falling outside the pure magnesium order." Accordingly, Magcorp asserted that the revised scope language provides that materials containing between 50% and 99.8% magnesium that do not conform to ASTM specifications for alloy magnesium are considered "off-specification pure" magnesium and are included within the scope of the order.

In specifically addressing Rosborough's argument that its magnesium ingots are not included within the scope of the order because they contain more than 1.5% of alloying elements, Magcorp argued that Rosborough has misrepresented the scope definition. Magcorp stated that "in order for material to fall outside the scope, the material must both have a primary magnesium content below a certain level and conform to an ASTM specification for alloy magnesium." Magcorp claimed that Rosborough "incorrectly splits the test and asserts that meeting either part of the test is sufficient for a material to fall outside of the order's scope." Magcorp argued that the actual language of the scope demonstrates that Rosborough's interpretation is incorrect.

Magcorp argued that AZ10A alloy magnesium was never specified as an ASTM standard alloy; therefore, it fails to meet the necessary requirements for exclusion from the order. Magcorp stated that in order to meet ASTM specifications, a material must conform to specifically required testing methods that are set by ASTM. Only after a material has met the ASTM standard testing methods can it be considered an ASTM specification. Magcorp argued that AZ10A was one of the alloys listed on a register maintained by ASTM for companies who requested registration of material in order to have clarity about the nomenclature for describing the material. Magcorp stated that these alloys are cited in ASTM's alloy registration records, but are not official ASTM standard specification alloys because they have not met the testing standards ASTM requires in order to meet ASTM specifications. Magcorp further argued in its rebuttal comments that regardless of whether Rosborough considered AZ10A's appearance on the 1995 ASTM magnesium alloy registration record to be sufficient for exclusion from the order, Rosborough knew that the AZ10A

magnesium was specifically deleted from the ASTM registration listing with issuance of the 1996 ASTM Book. Moreover, Magcorp asserted that just because Rossborough stated that its purchase order lists AZ10A as ASTM specification does not mean that it has met ASTM specification standards.

Finally, Magcorp stated that it believed that there is no commercial use for AZ10A, other than to displace pure magnesium "in uses where pure magnesium is the normally used material." Magcorp stated that it believed that Rossborough is using AZ10A as a substitute for pure magnesium in making steel desulfurization compounds. Therefore, Magcorp asserted that the Department should consider the use of Rossborough's magnesium ingots in its scope inquiry analysis because the use of the merchandise is contrary to the intent of the order.

As mentioned above, on April 2, 1999, in accordance with 19 CFR 351.225(k)(1), we issued a preliminary determination that magnesium alloy ingots imported by Rossborough are within the scope of the antidumping duty order on pure magnesium from the PRC because they fall within the definition of "off-specification pure" magnesium explicitly covered by the order (see Preliminary Scope Ruling--Antidumping Duty Order on Pure Magnesium from the People's Republic of China, Requested by Rossborough Manufacturing Company L.P. (Preliminary Scope Ruling), April 2, 1999)). Interested parties were invited to comment on our preliminary scope ruling and comments were filed by Rossborough and Magcorp on April 14, 1999. Rebuttal comments were filed by Rossborough and Magcorp on April 19, 1999, and April 21, 1999, respectively.

In its comments on April 14, 1999, Magcorp expressed its support of the Department's preliminary ruling. Rossborough, on the other hand, in its comments on April 14, 1999, disagreed with the Department's preliminary ruling, as discussed in the "Interested Party Comments and Department's Positions" section of this memorandum, below.

The following, with only minor changes, is the analysis presented in our preliminary determination. We were not persuaded by the parties' comments to change our position in arriving at our final determination in this case. However, we conclude by responding to the parties' comments, thereby explaining why we believe no changes in our position are warranted.

Analysis

The regulations governing the Department's antidumping scope determinations can be found at 19 CFR 351.225. On matters concerning the scope of an antidumping duty order, the Department first examines the descriptions of the merchandise contained in the petition, the determinations of the Secretary and the Commission, the initial investigation and the order. This determination may take place with or without a formal inquiry. If the Department determines that these descriptions are dispositive of the matter, the Department will issue a final scope ruling as to whether or not the subject merchandise is covered by the order. See 19 CFR 351.225(d)(e), and (f)(4).

Conversely, where the descriptions of the merchandise are not dispositive, the Department will consider the additional factors set forth at 19 CFR 351.225(k)(2). These criteria are: i) the physical

characteristics of the merchandise; ii) the expectations of the ultimate purchasers, iii) the ultimate use of the product; iv) the channels of trade in which the product is sold; and v) the manner in which the product is advertised and displayed. The determination as to which analytical framework is most appropriate in any given scope inquiry is made on a case-by-case basis after consideration of all evidence before the Department.

In this instant case, we have evaluated Rossborough's request in accordance with 19 CFR 351.225(k)(1) because the descriptions of the product contained in the petition, the initial investigation, the determinations of the Secretary and the Commission, and the antidumping duty order are dispositive of the issue. Therefore, we have not referred to the additional factors found in 19 CFR 351.225(k)(2).

Documents, or parts thereof, from the underlying investigation deemed relevant by the Department to the scope of the outstanding order were made part of the record of this scope determination and are referenced herein. Documents that were not presented to the Department or placed by it on the record, do not constitute part of the record of this scope determination.

To address Rossborough's first argument that the product at issue does not conform to the definition of the merchandise subject to the order, we have reviewed the description of the merchandise contained in the petition and the LTFV investigation. We have also reviewed the Secretary's and the Commission's determinations and a prior scope determination.

After our preliminary determination in the LTFV investigation, the petitioner argued that the scope definition was unclear and did not properly differentiate between pure and alloy magnesium. Specifically, the petitioner argued that "off-specification" pure magnesium (*i.e.*, magnesium that is less than 99.8 percent pure magnesium but that otherwise can be and is considered pure magnesium by consumers) should be considered within the scope of the pure magnesium proceeding instead of within the scope of the alloy magnesium proceeding (See, Pure Magnesium Final Determination, 60 FR at 16437 and 16439). In fact, the record in our proceeding showed that sales of magnesium not meeting the normal definition (based on magnesium content) were supplied to fulfill orders for pure magnesium. After reviewing comments from both the petitioner and respondents, the Department revised the scope in the final determination to include off-specification pure magnesium within the definition of pure magnesium. The Department explained that the scope was revised to include any product (1) that is 50 percent or more primary magnesium, and (2) that does not meet any ASTM definition of alloy magnesium (based on specific percentages of one or more alloying agents). The actual scope language in the Commission's final injury determination (ITC Final at I-6), the Department's Pure Magnesium Final Determination, the Department's antidumping duty order and the Department's November 14, 1997, final scope ruling defines products generally referred to as "off-specification pure" magnesium as products that contain 50 % or greater, but less than 99.8 % primary magnesium, by weight, and that do not conform to ASTM specifications for alloy magnesium." As further clarification, we stated in Comment 1 of our Pure Magnesium Final Determination that, metal with a primary magnesium content below 99.8 percent magnesium should be captured in the scope of the pure magnesium investigation if it cannot legitimately be

defined as a specific ASTM alloy magnesium (see, Pure Magnesium Final Determination, 60 FR at 16439).

Based on our scope description, we find that AZ10A magnesium alloy ingots fall within the definition of "off-specification pure" magnesium covered by the scope of the order. Although the scope definition states that "off-specification pure" magnesium generally does not contain, individually or in combination 1.5 percent or more, by weight, of specified alloying elements, the actual scope language clearly defines "off-specification pure" magnesium as magnesium that contains 50 percent or greater, but less than 99.8 percent primary magnesium, by weight, and that does not conform to ASTM specifications for alloy magnesium. In considering record evidence and the arguments of the parties, the Department finds that based on the definition of "off-specification pure magnesium," AZ10A is within the scope. Rossborough states in its scope request that the content of the imported material may vary; however, the total critical alloy range may be as high as 2.248 percent. Therefore, the material can contain as much as 97.75 primary magnesium which is greater than 50 percent, but less than 99.8 percent primary magnesium, by weight, as described in the antidumping duty order and in the Department's final scope ruling.

To address Rossborough's second argument that AZ10A meets the scope definition of "conforming to ASTM specifications," we examined the records of the past proceedings. We noted that the Department modified its scope of investigation in its final determination in order to clarify the distinctions between pure and alloy magnesium. Within the context of the modified scope definition, the Department states that alloy magnesium that conforms to ASTM specifications for alloy magnesium is not within the scope of the investigation for pure magnesium. We note in Comment 1 of the Department's Pure Magnesium Final Determination that our consultations with the Bureau of Mines established that the industry standards for alloy magnesium are American Society for Testing and Materials ("ASTM") standards. Therefore, within the context of the order, when the Department refers to ASTM specifications, it refers to products that have met ASTM standards and testing requirements.

As stated by Magcorp and confirmed by our discussion with experts at ASTM, in order to meet ASTM specification, material must meet specific testing requirements for "working standards" that have been set by ASTM. Industry experts at ASTM confirmed, as stated by Rossborough, that Dow Chemical had requested that AZ10A be added to the register list which may be used by companies in describing the nomenclature of the material. However, AZ10A was removed from the list after 1995 because there was no recollection by any of the members of the society that AZ10A was listed in any ASTM "working standards" which had met ASTM's testing requirements (see Memorandum from Mary Jenkins to the File dated March 15, 1999). Based on the foregoing analysis, we find that AZ10A does not conform to ASTM specifications for alloy magnesium. Consequently, AZ10A alloy magnesium falls within the scope as defined in our Pure Magnesium Final Determination which states that, "Although ASTM standards define pure magnesium as not less than 99.8 percent magnesium, metal with a primary magnesium content below that level should be captured in the scope of the pure magnesium investigations if it cannot legitimately be defined as a specific ASTM alloy magnesium," 60 FR 16439 (March 30, 1995). Although the written description of the merchandise is dispositive, we

note that AZ10A is also classifiable under HTS subheading 8104.19.00, which is covered by the Department's antidumping duty order for pure magnesium products.

In making the above finding, because we have determined that AZ10A is covered by the antidumping order on pure magnesium from the PRC pursuant to 19 CFR 351(k)(1), it is not necessary to address the issues of circumvention and use of the merchandise raised by the petitioner.

Rosborough asserts that the Department's scope ruling should be prospective only and not made retroactive. However, we note that in accordance with 19 CFR 351.225(l)(3), if the Department issues a final scope ruling to the effect that the product in question is included within the scope of the order, any suspension of liquidation previously in effect will continue. In this case, suspension of liquidation of entries of the merchandise at issue has been in effect prior to the initiation of the scope inquiry, as indicated by a November 10, 1998, Notice of Action from the U.S. Customs Service and confirmed by an in-house data query conducted on imports of the merchandise at issue. (See April 29, 1999, Memorandum to the File Regarding Results of In-House U.S. Customs Service Data Query.) Therefore, consistent with our regulations, we will apply the scope ruling beginning with the effective date of the U.S. Customs Service's suspension of liquidation of the merchandise at issue.

Conclusions

Based on the foregoing analysis, we find that the magnesium alloy ingots imported by Rosborough from the PRC is covered by the scope of the order on pure magnesium from the PRC. The evidence on the record indicates that this merchandise falls under the definition of "off-specification" pure magnesium which is expressly covered by the scope.

Interested Party Comments and Department Positions

1. Magcorp generally agrees with the Department's preliminary determination that AZ10A is within the scope of the antidumping order under 19 CFR 351.225(k)(1). However, Magcorp maintains that while the Department's preliminary scope ruling was based on descriptions of the product contained in the petition, the final determination of the Department and the ITC in the original investigation, and the antidumping order under 19 CFR 351.225(k)(1), the Department should nonetheless find that AZ10A is within the scope based on the criteria set forth under 19 CFR 351.225(k)(2), which incorporates consideration of such factors as the expectations of the ultimate purchasers and the ultimate use of the product. Magcorp states that it has presented the Department with the evidence that would be necessary to find that AZ10A is within the scope based on 19 CFR 351.225(k)(2). Furthermore, Magcorp asserts that Rosborough has admitted information that shows that AZ10A is within the scope based on its use, as it stated that it sought to replace purchases of pure magnesium from Magcorp with AZ10A imports from the PRC because it was an economical additional source of supply.

Rossborough disagrees with the Department's preliminary scope ruling, in general, as well as the petitioner's argument that the Department should base its scope ruling on the Diversified Products actors referred to in 19 CFR 351.225(k)(2), in particular. According to Rossborough, these factors should be considered only when the criteria under 19 CFR 351.225(k)(1) are not dispositive of the issue. Rossborough asserts that in this case, the Department found the latter criteria to be dispositive of the issue and, therefore, contends that no further inquiry is warranted under 19 CFR 351.225(k)(2). Rather, Rossborough maintains that a determination that AZ10A is outside the scope of the antidumping order can be made based solely on the criteria referred to in 19 CFR 351.225(k)(1).

As stated in 19 CFR 351.225(k)(2), when the criteria in 19 CFR 351.225(k)(1) are not dispositive of the issue, the Secretary will further consider the factors enumerated in 19 CFR 351.225(k)(2). In this instance, we have determined that the criteria in 19 CFR 351.225(k)(1) are dispositive of the issue. Therefore, as stated in our preliminary scope inquiry, we have not referred to the additional factors found in 19 CFR 351.225(k)(2) in making our final scope ruling.

2. Rossborough maintains that the Department's consultation with ASTM concerning ASTM testing requirements or "working standards" criteria, which, according to Rossborough, played no part in the Department's or the ITC's original investigations or any prior scope ruling, emphasizes the fact that the order was never meant to distinguish ASTM standards, specifications, or registrations. Rossborough submits that if the scope of the order was unambiguous and subject to interpretation by reference to the factors in 19 CFR 351.225(k)(1), there should have been no need to gather or rely upon additional information from ASTM.

The Department's reliance on the factors set forth in 19 CFR 351.225(k)(1) does not preclude seeking clarification and confirmation from government representatives such as the Bureau of Mines, or industry experts such as the ASTM, on factual information placed by parties on the record of a scope inquiry proceeding. In this proceeding, both parties presented extensive factual information about the nature of AZ10A and the meaning of the term "ASTM specification" referred to in the context of the antidumping order. In accordance with our normal practice, we attempted to confirm the validity of such factual information placed on the record via subsequent discussions with the ASTM and the U.S. Geological Survey (previously called the Bureau of Mines). Notwithstanding this fact, we note that consultations with the Bureau of Mines as to the designation of ASTM standards as the proper industry standards for alloy magnesium also occurred during the LTFV investigation (see Pure Magnesium Final Determination at Comment 1). Moreover, the parties in this proceeding have been given an opportunity to comment on the results of our discussions with these organizations in the context of this proceeding in accordance with due process principles.

3. Rossborough argues generally that AZ10A meets the ASTM definition for alloy magnesium which was excluded from the scope of the antidumping order, and that the antidumping order was intended to exclude alloy magnesium beyond that identified in ASTM working specifications. Specifically, Rossborough asserts that the Department's preliminary

scope ruling incorrectly narrowly interprets the term "specifications" to encompass only materials within the so-called "working standards" promulgated by ASTM. Rossborough asserts that while the Department concluded in the final determination of the LTFV investigation that ASTM standards, rather than some other industry standards, should control the definition of alloy magnesium excluded from the scope, it never outlined those standards. While Rossborough believes that the terms "standard" and "specification" have been employed interchangeably and do not suggest that the Department intended to convey a technical distinction, Rossborough asserts that the Department's reference to "any ASTM definition" in the final determination of the LTFV investigation (60 FR 16437, 16439; March 30, 1995) belies such an intent. Rossborough contends AZ10A met an ASTM definition, specifically a registration, in effect at the time the order was promulgated; and, moreover, has an alloy content of more than 1.5 percent which generally would place it outside the definition of off-specification pure magnesium and outside the scope of the order.

Furthermore, Rossborough argues that when the Department drafted the definition of off-specification pure magnesium in the final determination of the LTFV investigation, it chose the minimum 1.5 percent alloy content threshold to include all ASTM magnesium alloy designations. Rossborough contends that the reference to "any ASTM definition of alloy magnesium" in the Department's final determination was meant literally to include published working standards, as well as registrations. Otherwise, according to Rossborough, the final determination and antidumping order would not have distinguished ASTM magnesium alloy and off-specification pure magnesium at 1.5 percent alloy content, but rather at a higher content level. Rossborough argues that since there can be no other reasonable explanation for the 1.5 percent content level, the scope of the antidumping order should be interpreted in light of its purpose and history to exclude alloy magnesium which meets "any ASTM definition of alloy magnesium," no matter how otherwise characterized. In Rossborough's opinion, any other interpretation effectively amends the antidumping order in a manner contrary to law.

We disagree with Rossborough that AZ10A meets the ASTM specification for alloy magnesium which was excluded from the scope of the antidumping order, and that the antidumping order was intended to exclude alloy magnesium beyond that identified in ASTM working standards.

First, Rossborough confuses the terms ASTM "specification" and ASTM "registration," which, as outlined in the preliminary ruling and the memorandum from Mary Jenkins to the File dated March 15, 1999, are not synonymous or interchangeable terms. As described in the "Department's Analysis" section above, the term "specification" has meaning with respect to testing requirements for ASTM working standards while the term "registration" does not.

Second, the Department's statements in the final determination demonstrate that the Department intended to use the term ASTM "specification" (which is the actual term used in the scope language of the order) to limit the exclusion to alloy magnesium meeting ASTM standards. During the course of the investigation, the petitioner requested that the Department clarify the scope of its investigation of pure magnesium to capture off-specification pure magnesium. The petitioner

demonstrated that off-specification pure magnesium is considered pure magnesium by consumers and is used in applications that require pure magnesium. In order to differentiate off-specification pure magnesium from alloy magnesium, the petitioner proposed scope language that would exclude from the scope of off-specification pure magnesium, alloy magnesium that conformed to an ASTM "standard" for alloy magnesium or "other industry standards." However, in our Pure Magnesium Final Determination, the Department decided not to adopt the petitioner's suggestion that we exclude magnesium conforming to "other industry standards" from the off-specification pure magnesium scope. This decision was based on a discussion with the Bureau of Mines which established that "the industry standards for alloy magnesium are ASTM standards." See Pure Magnesium Final Determination at comment 1) (emphasis added). The Department also stated that magnesium with a primary magnesium content of less than 99.8% "should be captured in the scope of the pure magnesium investigations if it cannot legitimately be defined as a specific ASTM alloy magnesium." See id. (emphasis added). These statements reflect the intent that the Department's use of the phrase "ASTM specifications for alloy magnesium" in the scope language of the order limits the exclusion to alloy magnesium that meets specified ASTM standards for alloy magnesium.

Third, with respect to Rossborough's arguments concerning the level of alloy content, we note that pursuant to the Department's request in the LTFV investigation, the petitioner provided comments clarifying the definition of alloy magnesium which were subsequently adopted in the Department's final determination. Specifically, the petitioner stated in those comments that: "...the definition of alloy magnesium was clarified to include only primary magnesium products containing not less than 1.5 percent (generally) by weight, individually or in combination, one or more of the following: aluminum, manganese, zinc, silicon, thorium zirconium or rare earths. It is the addition of these alloying agents, in at least the specified quantity, that alters the mechanical and physical properties of the magnesium to make it suitable for use as a structural material." (See March 9, 1995 Letter from Baker & Botts to the Department Re: Clarification of the Scope of Investigations at 3.) Therefore, we considered in part the definition of alloy magnesium based on the content of the above-referenced alloying elements to provide the proper basis for distinguishing between pure and alloy magnesium.

More importantly, as is clear in our Pure Magnesium Final Determination, the Department's reason for clarifying the scope of the pure magnesium investigation was to capture off-specification magnesium that was considered pure magnesium by consumers and was being used in the same applications. Consequently, in order to clarify that off-specification magnesium was within the scope of the antidumping duty order on pure magnesium, the Department added scope language covering off-specification pure magnesium and provided some further explanation of its physical characteristics. In this explanatory language, the Department used the term "generally" in discussing the level of alloy content characteristic of off-specification pure magnesium. The use of the term "generally" denotes that the alloy content levels identified are approximate and purposely avoids establishing a bright-line test which would exclude from the scope of the order magnesium products that meet the actual scope definition of off-specification pure magnesium but that might have an alloy content level slightly greater than 1.5%. Ultimately, as stated in our antidumping duty order, to be excluded from the scope of pure magnesium, the alloy magnesium must also meet ASTM specifications, which we have determined not to be the case for AZ10A.

5. Rossborough argues that the Department made a de facto negative scope ruling in 1996, when a Department official allegedly confirmed orally that AZ10A was excluded from the order in response to a letter sent by Rossborough's consultant on September 30, 1996. While Rossborough admits that the letter was not in the "customary" format for a scope ruling request, it claims that it was in fact an application for a scope ruling. Rossborough submits that it subsequently relied on the Department's oral advice in conducting its business. Rossborough asserts further that the Department should have confirmed the alleged oral ruling in writing and served interested parties accordingly, or should have advised Rossborough's consultant to resubmit the request. Therefore, Rossborough argues, if the Department does not make a negative final scope ruling in this case, any entries of AZ10A made prior to the date of initiation of the scope inquiry (i.e., January 14, 1999), including those made by Rossborough, must be liquidated without the assessment of antidumping duties in accordance with 19 CFR 351.225(l)(2).

In other words, Rossborough argues that even if the Department does not rule the merchandise at issue to be outside the scope, the final scope ruling still should not be applied retroactively to all unliquidated entries. While Rossborough does not challenge the underlying principle or the propriety of the Department's practice to do so when the scope ruling is viewed as a mere clarification of the antidumping order, it asserts that this practice may be applied only if warranted by the current regulations. In this case, Rossborough contends that the scope ruling should be applied only prospectively because: (1) the company relied on the alleged past oral representations of Department and U.S. Customs Service officials that the product, identified by its alloy content, was outside the scope of the order, and subsequently entered AZ10A into the U.S. Customs territory from January through June 1998 without regard to antidumping deposits or identification numbers; and (2) the judicial precedent cited in the preliminary determination for the retroactive application of the scope ruling involved administrative proceedings and transactions that predated the effective date of the Department's current regulations at section 351.225(l).

Magcorp asserts that because the Department's scope ruling merely clarifies the scope of an existing order, the Department's practice is to apply a scope ruling beginning with the entire period of investigation from the date when suspension of liquidation first occurred. Furthermore, Magcorp contends that Rossborough's assertions with respect to its alleged 1996 contacts with the Department and the U.S. Customs Service constitute new information which Rossborough had ample opportunity to place on the record of the proceeding prior to the post-preliminary determination briefing period. Moreover, the petitioner asserts that the substance of the new information contained in the affidavit of Rossborough's consultant which was attached to its April 14, 1999 submission, does not support its claim that the merchandise at issue was outside the scope, as both Department officials with whom Rossborough's consultant claimed to have spoken indicated that AZ10A was outside the scope of the order if it met any ASTM specification.

We disagree with Rossborough's claims that the Department made an official scope ruling on the merchandise at issue prior to April 2, 1999, the date of the Department's preliminary scope ruling in this case. With respect to the discussions that Rossborough's consultant claims to have had with Department officials in 1996 which Rossborough subsequently interpreted as a "de facto" informal scope ruling, we note that it is not the Department's practice to make scope rulings verbally. Indeed, the law requires the Department to make scope determinations on the basis of substantial evidence on an administrative record. See 19 U.S.C. § 1516a(b)(1)(B)(i). Additionally, the Department will notify interested parties of a scope ruling and, in most situations, will provide them an opportunity to comment in a scope proceeding. See 19 CFR § 351.225 (d),(f),(n) and (o); see also 19 CFR § 353.29(b) and (d) (Department's old regulations). We note that in a letter from the Department to Rossborough, dated November 19, 1998, we informed Rossborough that we could not provide Rossborough with a scope ruling without the participation of interested parties in a record inquiry. Moreover, as Rossborough admits, the September 30, 1996 letter sent by Rossborough's consultant was not only in an improper format for a scope ruling request, but was also never officially filed with the Department's Central Records Unit.

More importantly, as the affidavit that Rossborough submitted on the record of this inquiry attests, the response of the Department's officials to Rossborough's inquiry in 1996 was that AZ10A would be out of the scope if it met any ASTM specification. At no time did the Department officials state that AZ10A did, in fact, meet an ASTM specification. To the contrary, in this case, the Department's scope ruling focuses on the fact that AZ10A does not conform to ASTM specifications.

With respect to the petitioner's argument that the information contained in the above-referenced affidavit constitutes new information that the Department should reject as untimely, we disagree. We note that in our April 2, 1999 letter notifying interested parties of our preliminary scope ruling, we solicited comments and/or factual information on our preliminary decision.

Furthermore, we disagree with Rossborough's comment that AZ10A entering the United States during the period January 1998 through June 1998 was not within the scope of the order for pure magnesium. In fact, as Rossborough noted in its April 13, 1999 case brief at 7-8, the U.S. Customs Service suspended liquidation of this merchandise based on the descriptions of the merchandise subject to the antidumping duty order, pending a scope ruling from the Department to the contrary. As stated above, AZ10A would not be in the scope of the order for pure magnesium if it conformed to ASTM specifications. However, in this case, we found that AZ10A cannot legitimately be defined as a specific alloy magnesium that conforms to ASTM specifications for alloy magnesium. Consequently, AZ10A alloy magnesium falls within the scope as defined in our Pure Magnesium Final Determination.

In addition, we agree with Rossborough that the Department's current regulations at 19 CFR 351.225(l) apply in determining the effective date of application of the scope ruling in this case,

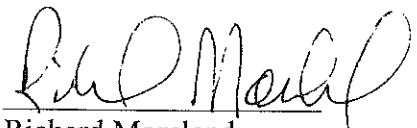
and that the judicial precedent the Department cited in its preliminary scope ruling (i.e., Wirth v. United States, 5 F. Supp. 2d 968, 982 (Ct. Int'l Trade 1998), and Timken Co., v. United States, 972 F. Supp. 702, 703 (CT. Int'l Trade 1997)) involved cases which were governed by the Department's old regulations at 19 CFR Part 353. We have changed our discussion of this issue in the "Analysis" section of this memorandum to reflect this. However, as discussed in our revised "Analysis" section, the Department's current regulations would still require the application of this scope ruling to Rossborough's January 1998 through June 1998 entries of AZ10A. 19 CFR 351.225(l)(3) provides that if the Department issues a final scope ruling to the effect that the product in question is included within the scope of the order, any suspension of liquidation previously in effect will continue. As discussed above, because the U.S. Customs Service did, in fact, suspend Rossborough's entries of AZ10A prior to initiation of the scope inquiry, the Department will instruct the U.S. Customs Service to continue the suspension of liquidation or to assess antidumping duties, whichever action is appropriate based upon the entry date of the merchandise.

Recommendation

We recommend that the Department, in accordance with 19 CFR 351.225(f)(4), determine that AZ10A imported by Rossborough is within the scope of the antidumping duty order on pure magnesium from the PRC. In compliance with the order, AZ10A is off-specification pure magnesium that cannot legitimately be defined as a specific alloy magnesium that meets commercial ASTM specifications. We also recommend, that with respect to entries of AZ10A magnesium, we will instruct the U.S. Customs Service to continue its suspension of liquidation or to assess antidumping duties, whichever action is appropriate based upon the entry date of the merchandise.

We recommend applying this final scope ruling to the antidumping duty orders on pure magnesium from Canada and Russia.

Agree Disagree


Richard Moreland
Deputy Assistant Secretary
AD/CVD Enforcement Group I

July 22, 1999
Date